LIBRARY
SUPREME COURT, U.S.

FILED
NOV 16 1951

No. 136

In the Supreme Court of the United States

OCTOBER TERM, 1951

JAMES W. BUTTERFIELD, DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, DETROIT, MICHIGAN, PETITIONER

v.

JOHN ZYDOK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	2
Summary of argument	3
Argument:	7
I. The detention of the respondent without bond was in the circumstances of the case within the discretion granted the Attorney General by Congress	10
A. Congress gave the Attorney General broad discretionary power to detain aliens pending deportation, intending that the factor of Communist activity be given great weight	11
B. The Attorney General's order that the respondent be detained in custody was well within the discretionary authority given him by Congress	25
II. There is no constitutional impediment to the detention of the respondent pending a determination of his liability to deportation	28
A. The Eighth Amendment does not require that the respondent be released on bail	30
B. The Fifth Amendment does not prevent the continued detention of respondent pending determination as to his deportability	36
Conclusion	41

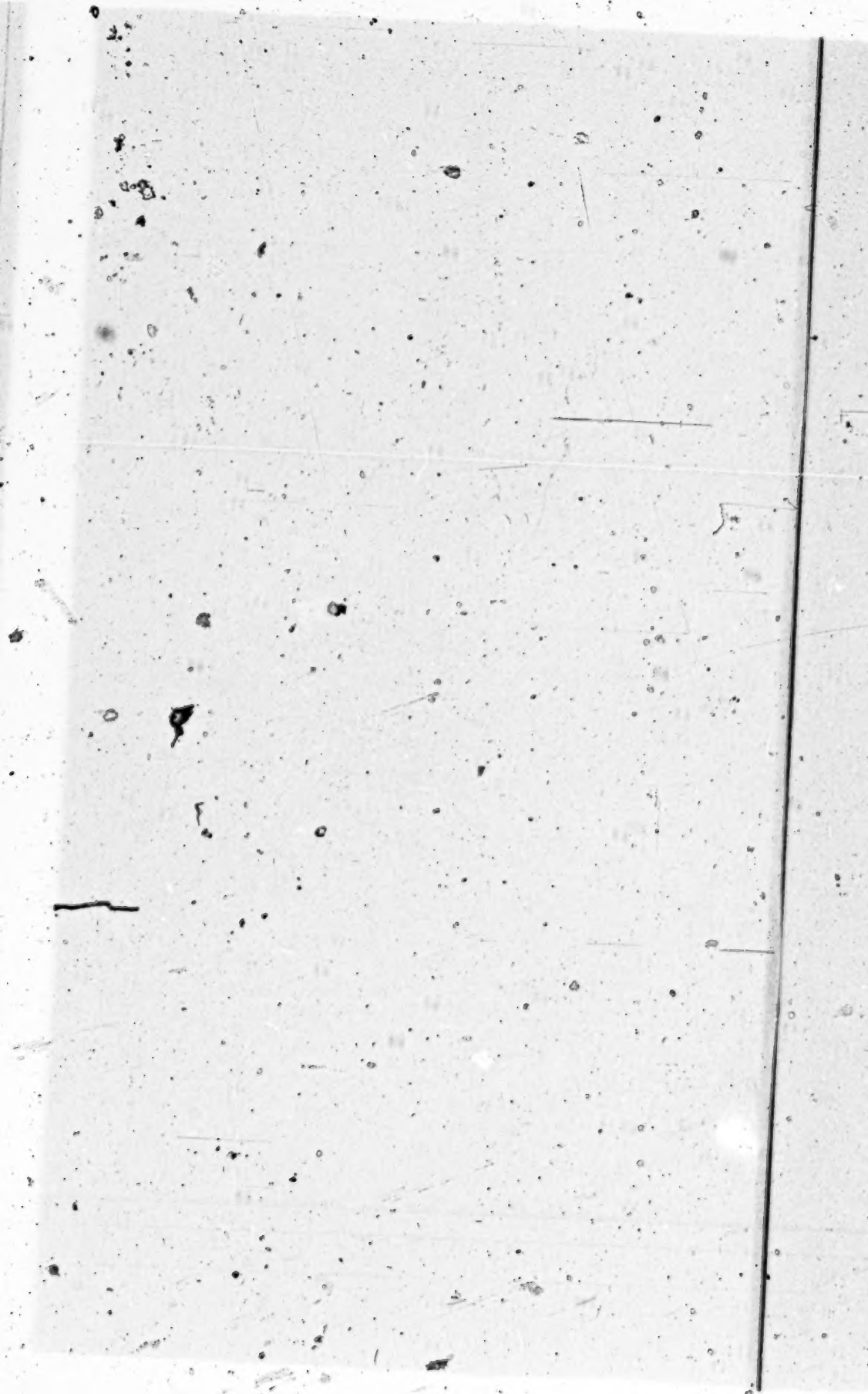
CITATIONS

Cases:	
Ah Tai, In re, 125 Fed. 795	31, 33
Bugajewitz v. *Adams*, 228 U. S. 585	29
Carlson v. *Landon*, 187 F. 2d 991	40
Chae Chan Ping v. *United States*, 130 U. S. 581	29
Chin Wah v. *Colwell*, 187 Fed. 592	33
Fong Haw Tan v. *Phelan*, 333 U. S. 6	29
Fong Yue Ting v. *United States*, 149 U. S. 698	28, 29, 32, 41
Hanoff, In re, 39 F. Supp. 169	36
Hudson v. *Parker*, 156 U. S. 277	31
Japanese Immigrant Case, The, 189 U. S. 86	29, 30

Cases—Continued

	Page
Jordan v. *De George*, 341 U. S. 223	20
Lum Poy, In re, 128 Fed. 974	31
Nishimura Ekiu v. *United States*, 142 U. S. 651	29
Perkoy, Ex parte, 45 F. Supp. 864	31, 33, 36
Prentis v. *Manoogian*, 16 F. 2d 422	8, 14, 33, 39
Principe v. *Ault*, 62 F. Supp. 279	33
Stack v. *Boyle*, No. 400, October Term 1951, decided November 5, 1951	31
United States v. *Delaney*, 8 F. Supp. 224	36
United States v. *Motlow*, 10 F. 2d 657	31
United States ex rel. Carapa v. *Curran*, 297 Fed. 946	31, 36
United States ex rel. De Cicco v. *Longo*, 46 F. Supp. 169	33
United States ex rel. Fook Tong v. *Watkins*, 58 F. Supp. 906	33
United States ex rel. Heikkinen v. *Gordon*, 190 F. 2d 16	40
United States ex rel. Ioannis v. *Garfinkel*, 44 F. Supp. 518	33
United States ex rel. Janavaris v. *Nicolls*, 47 F. Supp. 201	41
United States ex rel. Potash v. *District Director of Immigration*, 169 F. 2d 747	8, 15–17, 20, 26, 33, 39
United States ex rel. Zapp v. *District Director of Immigration and Naturalization*, 120 F. 2d 762	15, 38
Vajtauer v. *Commr. of Immigration*, 273 U. S. 103	30
Watkins, Ex parte, 7 Pet. 568	31
Williamson v. *United States*, 184 F. 2d 280	31
Wong Wing v. *United States*, 163 U. S. 228	10, 13, 19, 32, 37
Wong Yang Sung v. *McGrath*, 339 U. S. 33	3
Zakonaite v. *Wolf*, 226 U. S. 272	29, 30
Constitution, statutes, and ordinance:	
U. S. Constitution:	
Fifth Amendment	9, 10, 37
Eighth Amendment	9, 10, 30, 32
Act of October 16, 1918, as amended (8 U. S. C. 137)	3
Act of October 16, 1918, as amended by Sec. 22 of the Internal Security Act of 1950 (8 U. S. C., Supp. IV, 137)	3, 23
Alien Act of June 25, 1798 (1 Stat. 570)	28
Chinese Exclusion Act of 1892 (27 Stat. 25)	37
Immigration Act of 1903 (32 Stat. 1213)	12, 38
Immigration Act of 1907, Sec. 20 (34 Stat. 898)	7, 13, 14, 38
Immigration Act of 1917, Sec. 20 (39 Stat. 890)	14, 20
Immigration Act of February 5, 1917, Sec. 20 (a) (39 Stat. 890, 54 Stat. 1238, 57 Stat. 553), as amended by Section 23 of the Internal Security Act of 1950 (64 Stat. 1010) (8 U. S. C., Supp. IV, 156 (a))	2, 4, 8, 11, 13, 18, 20, 25, 40
Internal Security Act of 1950, 64 Stat. 987	27
Sec. 2	8, 23, 28
Judiciary Act of 1789, Sec. 33, 1 Stat. 91	30
Ordinance of 1787 for the Northwest Territory, Act II (U. S. C. 1946 ed., p. XX-XIV)	30

Constitution, statutes, and ordinance—Continued Page
English Bill of Rights of 1688 (1 Wm. & C. M., ch. 2, 1688) 33
5 Halsbury's Statutes of England (2d ed., 1948) 35
Indictable Offenses Act, 1848 (11 and 12 Vict., c. 42, S. 23 34
Statute of Westminister (First) (3 Ed. 1, Ch. 15 (1275) 34
Miscellaneous:
8 C. F. R., (1949 ed.), Section 150.4–150.6 37
96 Cong. Rec. 10449–10450 21
96 Cong. Rec. 10453 22
96 Cong. Rec. 10457, 14181 13
96 Cong. Rec. 14486 18
96 Cong. Rec. 14601 18
4 Elliot's *Debates*, p. 554 28
H. R. 10, 81st Cong., 1st sess 17
H. Rep. 4458, 59th Cong., 1st sess 14
H. Rep. 1192, 81st Cong., 1st sess 17, 19, 21
Petersdorff, *On Bail* (1824), pp. 477–478 34
Rules of Criminal Procedure, Section 46 (a) 31
S. 1987, 81st Cong., 1st sess 19
Sen. Rep. 2239, 81st Cong., 2d sess., 81st Cong., 1st sess 13, 18, 20



In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 136

JAMES W. BUTTERFIELD, DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, DETROIT, MICHIGAN, PETITIONER

v.

JOHN ZYDOK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (R. 90–93) is reported at 187 F. 2d 802. The findings of fact and conclusions of law of the District Court appear at pages 8–14 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1951 (R. 90). The petition for a writ of certiorari was filed on June 22, 1951, and granted on October 8, 1951 (R. 93). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the detention of the respondent without bail pending the determination of his deportability was authorized by Section 20 (a) of the Immigration Act as amended by Section 23 (a) of the Internal Security Act of 1950.

2. Whether the detention of the respondent violated his rights under the Eighth or the Fifth Amendment.

STATUTE INVOLVED

Section 20 (a) of the Immigration Act of February 5, 1917 (39 Stat. 890, 54 Stat. 1238, 57 Stat. 553) as amended by Section 23 of the Internal Security Act of 1950 (64 Stat. 1010), provides in pertinent part as follows:

> * * * Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for deporta-

tion if an order for his deportation has been made. * * * .[8 U. S. C., Supp. IV, 156 (a).]

STATEMENT

In August 1949, respondent was taken into custody under a deportation warrant of arrest, issued on June 30, 1949 (R. 4–5), charging that he had been, after entry, a member of an organization advocating and teaching the violent overthrow of the government, and of an organization which published matter advocating such overthrow, and that he was therefore deportable under the Act of October 16, 1918, as amended (8 U. S. C. 137)[1] He was released on $2,000 bail shortly thereafter (R. 11). In October 1949, a deportation hearing was conducted under the warrant, but, as the result of the decision of this Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, it became necessary to grant him a new hearing (R. 77). The second hearing began September 19, 1950, but was adjourned at respondent's request (R. 9, 77). The hearing has now been completed and an order for deportation, which is now under appeal to the Board of Immigration Appeals, entered.

On October 21, 1950, shortly after the effective date of the Internal Security Act, the Assistant Commissioner of Immigration and Naturaliza-

[1] The 1918 Act has since been further amended by Section 22 of the Internal Security Act of 1950 to provide in addition for the exclusion or deportation of aliens who are or have been members of, affiliated with, the Communist Party (8 U. S. C., Supp. IV, 137).

tion sent petitioner a radiogram instructing him to apprehend respondent and detain him pursuant to Section 20 of the Immigration Act of 1917, as amended by Section 23 of the Internal Security Act of 1950, *supra*. The arrest was effected two days later under the outstanding warrant. In a radiogram dated October 25, 1950, the Acting Commissioner confirmed the Assistant Commissioner's instructions, specifically stating that respondent was to be held without bail. (R. 11, 16–17.)

Respondent filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, challenging the validity of his detention (R. 1–2). At a hearing on the writ, the following facts were adduced:

On May 25, 1949, in the course of the investigation leading to the issuance of the deportation warrant of arrest, respondent had stated under oath that he was a member of the Communist Party of Michigan and was Financial Secretary of the Hamtramck, Michigan, section of the Party (R. 52; Ex. 5, pp. 21, 22).[2] He had then stated that, at the last previous meeting of the section, they had discussed the New York Communist case, methods of raising funds for the defense thereof, and "the Chinese situation" (R. 46; Ex. 5, p. 27) and that, pursuant to instructions received from Communist Party headquar-

[2] Exhibit 5 was by stipulation included as an original exhibit before the court below (R. 89) and has or will be forwarded to this Court also as an original exhibit.

ters in New York, he had collected and delivered over $100 for the defense of that case (R. 46, 54; Ex. 5, p. 22). He had refused to state the number of persons who usually attended meetings of his unit of the Party or the names of the persons from whom he made the collections, because such information was a Party secret and he did not want to be a "stool pigeon" (R. 48; Ex. 5, pp. 23, 27). Respondent also stated at the investigation on May 25, 1949 that he attended the state convention of the Communist Party in December, 1948, as a delegate representing the Hamtramck Section of the Communist Party (Ex. 5, p. 29). The Commissioner of Immigration and Naturalization was furnished with a copy of the record of the May 1949 interrogation (R. 77).

In addition, in the 1950 deportation hearing, respondent had entered into a stipulation as to his past Communist record (R. 81, 82, 87). It appears that he was a member of the Party from 1919 to about 1938, that he was readmitted to the Party in 1947 (R. 80). Counsel for respondent also stated for purposes of the record that at the deportation hearings respondent had admitted he had been a member of the Communist Party and that he was financial secretary of the Hamtramck Section of the Communist Party (R. 88).

Respondent took the stand in support of his petition. He testified that he was employed in a cafe, later identified as the Detroit Workmen's

Cooperative Restaurant; that he owned a five-room house in Detroit, where he resided with his wife; that he had two sons, a daughter, and five grandchildren, all of whom were born in this country; that both sons served in the armed forces of the United States during World War II; that he had sold $50,000 in war bonds and donated blood seven times during that war; that he had reported regularly under the terms of his previous bail; and that he did not believe that he had violated any law since the enactment of the Internal Security Act. In addition, he testified that he would remain in this country and comply with any requirement to report as directed, if he were enlarged under bond (R. 23–26).

In denying the petition (R. 14), the District Court found, *inter alia*, that respondent's evasive demeanor on cross-examination demonstrated that he was still knowingly and wilfully participating in the Communist movement (Finding of Fact 16, R. 12); that an alien who has been free on bail pending final determination of his deportability may be rearrested and continued in custody without the issuance of a new deportation warrant of arrest (Conclusion of Law 2, R. 12); and that there had been no abuse of administrative discretion in continuing respondent in custody after his rearrest (Finding of Fact 17, R. 12).

The Court of Appeals for the Sixth Circuit reversed the District Court's judgment, with di-

rections to grant bail in some reasonable amount (R. 90, 92, 93). It held that, in determining the question of whether to deny bail, the Attorney General could not rest on membership in the Communist Party, but was under a duty to consider primarily the likelihood that the alien would appear when ordered to do so (R. 92). The opinion states (R. 92):

> The purpose of granting bail is to secure the presence of appellant when and as required. The denial of it is not intended as punishment. If bail is granted in some fair amount there is no reasonable ground to indicate that appellant would forfeit it.

SUMMARY OF ARGUMENT

I

The court below based its determination that the Attorney General had exceeded the discretionary authority granted him on the theory that bail must be granted unless there is reason to doubt that the alien will appear for future proceedings and for deportation. The court found that there was no basis for the Attorney General to doubt that the respondent would make himself available.

The position of the court below is based on a misconception of Congressional intent. The Immigration Acts, in their earlier forms, made no provision whatsoever for bail and it was not until the 1907 Act that the Attorney General was

even given authority to release an alien on bond. The Court of Appeals for the Second Circuit construed that provision to give the Attorney General wide discretion, subject to judicial review, to grant or to withhold bail and to consider a variety of factors in exercising that discretion. *United States ex rel. Potash* v. *District Director of Immigration*, 169 F. 2d 747. The Sixth Circuit on the other hand had held that the same act made the issuance of bail to aliens mandatory. *Prentis* v. *Manoogian*, 16 F. 2d 422. One of the purposes of amending Section 20 (a) in 1950 was to remove any possible doubt as to the Attorney General's discretionary authority in this respect.

Moreover, it is clear from the entire history of the Internal Security Act that Congress intended that the effect on national security should be a prime factor to be considered in determining whether to permit an alien to remain at large during deportation proceedings. Both in the introductory findings incorporated in Section 2 of the Act and in the substantive requirements, Congress made it clear that it considered Communist activity incompatible with national welfare. Therefore, the Attorney General carried out, rather than abused, the discretion given him by Congress when he determined to detain the respondent who admittedly was, or had recently been, an active member of the Communist Party and an official in the local organization of that

party. The court below was bound to accept the Attorney General's decision since it was based on admitted facts.

II

The respondent was not deprived of any Constitutional right by reason of his detention pending the determination of his deportability. It is well established that Congress has power to fix the policy for the exclusion and the deportation of aliens, that it may delegate to the executive branch of the government the duty of carrying out that policy, that deportation proceedings are not criminal in nature, but that aliens are entitled to due process of law in such proceedings.

The bail provisions of the Eighth Amendment and of the statutes relating thereto have always been considered as applicable only to criminal proceedings. Since deportation proceedings are not criminal in character, the Eighth Amendment has no application. Moreover, even if considered applicable, either directly or as an element of due process under the Fifth Amendment, the right to bail, as distinguished from protection against excessive bail, is statutory rather than Constitutional. This is true both in this country and in England from whose Bill of Rights the Eighth Amendment was derived. It is the legislature which determines whether or not bail may be granted, or must be granted, and the Constitution then forbids the exaction of excessive bail where

bail is permitted. It was therefore within the power of Congress, so far as the Eighth Amendment is concerned, to withhold an absolute right to bail in deportation proceedings.

With respect to the broader issue of whether the detention of an alien pending the determination of his deportability violates the due process clause of the Fifth Amendment, the issue has always been resolved in favor of permitting the alien to be held. This Court clearly stated that Congress had that power in *Wong Wing* v. *United States*, 163 U. S. 228, and no case which has followed has indicated a contrary result. Even those cases in which the courts have reversed the Attorney General's action on the ground of abuse of discretion have not expressed doubt as to the Constitutional power involved. Where the detention of aliens is an appropriate and necessary step in furtherance of the admittedly Constitutional Congressional policy to protect the national welfare by apprehending and deporting undesirable aliens, the Fifth Amendment does not effect a bar to such detention.

ARGUMENT

I

THE DETENTION OF THE RESPONDENT WITHOUT BOND WAS IN THE CIRCUMSTANCES OF THE CASE WITHIN THE DISCRETION GRANTED THE ATTORNEY GENERAL BY CONGRESS

The facts show that on October 21, 1950, the Attorney General ordered that the respondent be

detained without bond (R. 17) although the respondent had previously been free on a bond of $2,000 (R. 18). The timing of the rearrest, and the language of the order, make it apparent that the Attorney General was led to take the action by the passage of the Internal Security Act of 1950. The first questions to be answered in this case are: (a) what authority did Congress intend to give the Attorney General, and (b) did the Attorney General's action fall within that authority.

A: CONGRESS GAVE THE ATTORNEY GENERAL BROAD DISCRETIONARY POWER TO DETAIN ALIENS PENDING DEPORTATION, INTENDING THAT THE FACTOR OF COMMUNIST ACTIVITY BE GIVEN GREAT WEIGHT

Section 23 of the Internal Security Act of 1950 provides:

> * * * Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of the release on parole, that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken in custody and any other

charges which subsequently are lodged against him, and for deportation if an order for his deportation has been made.

The court below interpreted this section to mean that the discretion granted the Attorney General to retain an alien in custody is restricted to the question of the availability of the alien and that, once his availability is assured, there is no longer any area of discretion. The history of the bail provision in immigration legislation, together with the purpose, spirit and policy underlying the Internal Security Act of 1950 refute this position. Far from showing that Congress has followed a program of giving broad rights to bail in deportation proceedings limited only by the assurances of availability, the history of legislation on this subject reveals that Congress has either withheld the right to bail entirely or has given the Attorney General broad discretionary power to regulate the privilege and to grant or deny it. The legislative history of the Internal Security Act, viewed in its entirety, clearly establishes a Congressional intent that the Attorney General should give great weight to factors of national security in exercising the discretion conferred upon him.

The first provision for detention of aliens pending deportation proceedings against them appeared in the Act of 1903 (32 Stat. 1213) and directed immigration officials to take the deport-

able aliens "into custody" and deport them. No provision was made for release on bond pending determination of deportability. The authority for such detention had previously been recognized by this Court in *Wong Wing* v. *United States*, 163 U. S. 228, where in holding unconstitutional a statutory provision for imprisonment at hard labor of Chinese aliens found to be illegally in this country, this Court said at p. 235:

> We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.

Thus, from the start of this country's deportation program, release pending deportation hearings has been considered an act of grace, and not of right. It was upon this assumption that Congress acted in 1907 when it first granted the right to bail pending deportation, and in 1950, when it enacted the provision of the Internal Security Act here involved.[3]

[3] Throughout the debates on the bills which were ultimately incorporated in the present act, there was constant reference to the above-quoted passage of the *Wong Wing* decision. E. g. 96 Cong. Rec. 10457, 14181; S. Rep. 2239, 81st Cong., 2d sess., p. 8.

The first provision for bail appeared in Section 20 of the Immigration Act of 1907 (34 Stat. 898) which reads:

> SEC. 20. * * * *Provided*, That pending the final disposal of the case of any alien so taken into custody he may be released under a bond in the penalty of not less than five hundred dollars with security approved by the Secretary of Commerce and Labor, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States.

That this was deemed an act of grace is shown by the Committee Report which merely states that the proviso "seemed to your committee advisable." H. Rep. 4558, 59th Cong., 1st sess., p. 20.

This section appears not to have been judicially construed until after it was incorporated without change into the Immigration Act of 1917 (39 Stat. 890). Thereafter, a conflict developed as to the scope of the rights accorded an alien by this section. The Court of Appeals for the Sixth Circuit, in *Prentis* v. *Manoogian*, 16 F. 2d 422, held that, although in the absence of statute an alien would have no right to bail pending deportation proceedings, the statute conferred upon him a right which the administrative authorities were under a duty to grant. When the question came before the

Court of Appeals for the Second Circuit, it refused to follow the decision of the Sixth Circuit. In *United States ex rel. Zapp* v. *District Director of Immigration and Naturalization,* 120 F. 2d 762, 765, it held, rather, that

> The natural interpretation of the language used, that the alien "may be released under a bond," would indicate that the release is discretionary with the Attorney General; * * *
>
> * * * Further, it would seem the more natural under the circumstances; for any other course *would tie the hands of the government even in restraining dangerous foreign enemies within our borders.* [Emphasis added.]

The court pointed out that "there is no absolute right to freedom under such circumstances and no occasion to construe the statute broadly and loosely to accord it."

This holding was amplified and clarified by the Second Circuit in *United States ex rel. Potash* v. *District Director of Immigration,* 169 F. 2d 747. Potash was an alien charged with being a member of an organization advocating the overthrow of the Government by force and violence who had been detained without bail pending deportation proceedings. He sought release from custody by a writ of habeas corpus. The district court dismissed the writ on the ground that the discretion vested in the Attorney General was not subject to review. The Court of Appeals reversed that holding, and ruled

that the Attorney General's exercise of discretion was subject to judicial review. The Court then stated (169 F. 2d at p. 751):

> The discretion of the Attorney General which we held to exist in the Zapp case is interpreted as one which is to be reasonably exercised upon a consideration of such factors, *among others*, as *the probability of the alien being found deportable*, the seriousness of the charge against him, if proved, the *danger to the public safety of his presence within the community*, and the alien's availability for subsequent proceedings if enlarged on bail. [Emphasis added.]

It pointed out, further:

> However, in ony consideration of his denial of bail it should always be borne in mind that the court's opinion as to whether the alien should be admitted to bail can only override that of the Attorney General where the alien makes a clear and convincing showing that the decision against him was without a reasonable foundation. In the absence of such proof, the administrative determination is final. If the Eighth Amendment to the Constitution is considered to have any bearing upon the right to bail in deportation proceedings, and this has been denied, it is our opinion that the provisions of that Amendment and any requirement of the due process provisions of the Fifth Amendment will be fully satisfied if the standards of fairness and reasonable-

ness we have set forth regarding the exercise of discretion by the Attorney General are observed.

This decision was handed down on August 3, 1948, some months before the Hobbs bill (H. R. 10, 81st Cong., 1st sess.), which is the foundation of the pertinent provision in the present act, was introduced on January 3, 1949. The Hobbs bill contained in Section 3 the same language as that part of Section 23 of the Internal Security Act presently involved. The proposed language was continued in the latter part of subsection (a) as reported out by the Judiciary Committee and remained unchanged until final enactment. Its purpose was thus explained in the Committee Report (H. Rep. 1192, 81st Cong., 1st sess., pp. 5–6):

> This [existing law] has often been found to be lacking in clarity and doubtful in purpose when questions have arisen concerning procedure following arrest of an alien, or during the interim between his arrest and his hearing and decision on his case, or during the time after he is ordered deported and the accomplishment or failure of such deportation. The committee believes that this bill will greatly simplify such details.
>
> * * * The bill will expressly authorize the Attorney General, in his discretion, to hold arrested aliens in custody, or to release them under bond or on conditional parole,

> pending final determination of their deportability and for a 6-month period after an order of deportation is issued * * *. The bill intends that the Attorney General shall have untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond or conditional parole pending final determination of the deportability of the alien and for 6 months after an order of deportation has been issued against him.[4]

It is thus evident that Congress meant to resolve the conflict between the Second and Sixth Circuit decisions in favor of the holdings of the Second, and to make crystal clear the right of the Attorney General to detain an alien in custody.[5] It is significant that the first condition in amended Section 20 (a) is the power to "be

[4] The same phraseology appears in Senate report on the bill (S. Rep. 2239, 81st Cong., 2nd sess., p. 5).

[5] This was further emphasized by statements on the floor of the Senate by Senator Humphrey during the course of debates on the McCarran Act in which, in speaking for the Kilgore amendment which changed other features of the bill but kept the provisions for detention of aliens (see 96 Cong. Rec. 14601) he said:

"The Federal courts are divided as to the right of the Attorney General to keep an alien in custody for the full period during which deportation proceedings are pending against him. The latest court decisions support the view that the Attorney General may detain the alien during this period." 96 Cong. Rec. 14486.

"This provision in the bill clarifies the decisions of the courts which were split on the question of the Attorney General's right to detain aliens during this period." 96 Cong. Rec. 14486.

continued in custody." The statute was thus intended to reaffirm the original ruling of the *Wong Wing* case that release pending deportation hearings is not a matter of right, but a matter of grace. It also clearly intended the Attorney General to have primary responsibility in determining whether an alien should be released.[6]

[6] As reported out of Committee, the Hobbs bill was also designed to preclude judicial review of the Attorney General's discretion. Subsection (g) provided that no court would have jurisdiction to release an alien detained under any provision of law relating to exclusion or expulsion at any time prior to a decision of court in his favor which was not subject to further judicial review. Of this provision, the Committee Report stated (H. Rep. 1192, pp. 10–11):

"* * * The provision is designed to leave the question of releasing an alien from custody in an immigration case entirely in the hands of the Attorney General, who is the executive officer of the Government charged with administering the immigration laws. It in no way denies the right of any alien to test the legality of his detention through the courts; it merely states that the alien cannot be released by the court until judicial proceedings have been finally terminated in the alien's favor. Had such a provision been in effect in the past, it could have been utilized to prevent the escape from this country of the notorious Communist alien, Gerhart Eisler."

In the Senate, Senator Cain through Senator Wherry introduced a bill (S. 1987) similar to the Hobbs bill which provided:

"Neither the Attorney General nor any court shall permit or order any alien to be released from custody, on bond or otherwise (except for the purpose of leaving the country)—

"(1) pending final determination of his deportability, if the Attorney General has determined that such alien either is deportable by reason of his engaging in, or his intention to engage in, any of the activities described in this sub-

While the Committee Reports are silent as to the factors to be considered by the Attorney General in exercising his discretion to detain aliens, it should be noted that the decisions of the Second Circuit, referred to above, particularly the *Potash* case only recently decided, had accorded a large area of discretion to the Attorney General and had ruled that, in exercising his discretion, the Attorney General was at liberty to consider the activities of the alien and the danger to the community. Clearly, Congress had no intention of cutting down the discretion of the Attorney General in this respect.[7]

section, or is dangerous to the security, peace, or interest of the United States; * * *."

This bill was referred to the Senate Committee on the Judiciary, but before it was reported out, the Hobbs bill passed the House and came to the Senate. The Senate Committee on the Judiciary reported out the Hobbs bill instead of the Cain bill and provided for the possibility of judicial review of an alien's detention by a three-judge court (S. Rep. 2239, 81st Cong., 2d sess., p. 9).

Since no such provision was finally enacted, we do not urge that the Attorney General's discretion is not subject to any judicial review, but merely that his discretion can be overturned only on a showing of clear abuse.

[7] Further evidence that Congress had in mind factors other than availability is to be gathered from the provision in Section 20 (a), as amended (*supra*, p. 2) that "*among the conditions*" for the release of an alien on bond or parole shall be the requirement that he will be produced for the hearing and for deportation. The statute before its amendment in 1950 (*supra*, p. 14) made the undertaking to produce the alien the *only condition*. The House report makes specific reference to this change and explains that it was intended to give the Attorney General "untrammeled authority to

On the contrary, the whole tenor of the act and of the debates thereon show that it was the intention of Congress that the Attorney General should give paramount consideration to questions of national security in exercising his discretion to hold an alien in custody.

Thus Representative Walter, Chairman of the Judiciary Committee of the House, in explaining the bill, stated (96 Cong. Rec. 10449-10450):

> * * * As a matter of fact, the attention of the subcommittee of which I happen to be a member was called to the case of a man who was recently sent to the electric chair after he had twice been ordered deported because of armed robberies. No particular hardship is going to be worked on anyone because, bear this fact in mind, it is not mandatory on the Attorney General to hold people in detention. He is given discretionary power. If in his judgment one of the class of people I have just mentioned ought to be held for paramount national reasons, he may detain him, but he is not obliged to hold anybody, *although I trust that in every case of a subversive or a hardened criminal he will.* [Emphasis supplied.]

---

impose such conditions or terms as he sees fit in releasing an alien under bond or conditional parole * * *." (H. Rep. 1192, 81st Cong., 1st Sess., p. 6.) Since Congress specifically had in mind conditions other than availability in connection with the terms of a bond, it seems logical to presume that the other factors were also to be taken into consideration in determining whether a bond should be permitted.

While Representative Walter's remarks were specifically addressed to a section of the bill providing for the indefinite detention of aliens whose deportation was defeated by the refusal of foreign countries to accept them, which section was later dropped because of doubts as to its constitutionality, still they illustrate the concern felt by all the sponsors of the bill for the dangers to the country's welfare from subversive aliens not confined during the course of deportation proceedings. Similarly Representative Stefan of the Judiciary Committee spoke of the danger of alien-subversive-Communists "wandering over our country at will." He said (96 Cong. Rec. 10453):

> The present immigration laws, with reference to the detention and deportation of undesirable aliens, are grossly inadequate. The hands of American authorities are tied; the evil work of the Communists aided and abetted. The Communists, as might be expected, have played—and are still playing—this loophole in the internal security laws of the United States for all it is worth. They realize that once the foreign agent arrives in this country, nine-tenths of the battle is won. Even if he is identified and exposed, well, getting him out is a tedious, and in some instances, an unsuccessful fight. Even though he has been proven a menace to our country, under our present laws, he cannot be placed in detention quarters continuously until deportation, but may be released on bond. As long as he is in this

> country he is still available for use by the enemy. The continued presence of these undesirable aliens in this country represents an alarming danger to our national security.

Moreover, as finally enacted, the measure here under consideration is part of the Internal Security Act of 1950, passed because Congress was convinced that there was imminent danger to the nation from Communist activities. The act amended the Immigration Act of 1917 to provide in Section 22 that membership in the Communist Party is *per se* a ground for deportation (8 U. S. C., Supp. IV, 137). This represents a Congressional finding that membership in the Communist Party in and of itself renders an alien undesirable as a resident of this country and constitutes a mandate to the Attorney General to remove such alien as speedily as possible. As to the danger from Communism, Congress, in Section 2 of the Act, made its findings, in part as follows:

> (1) There exists a world Communist movement which, in its origins, its developments, and its present practice, is a worldwide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictator-

ship in the countries throughout the world through the medium of a world-wide Communist organization.

* * * * *

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide con-

spiracy and designed to prevent it from accomplishing its purpose in the United States.

When the provision for bail in Section 23 of the Internal Security Act, with its emphasis on the right of the Attorney General to hold an alien in custody pending hearing, is read in the light of the Internal Security Act as a whole, with its emphasis on the danger to the country from subversive Communist activities and the necessity of expelling alien Communist Party members, we submit that it cannot fairly be interpreted otherwise than as a direction to the Attorney General, when exercising his discretion to grant or withhold bail, to give great weight to the nature and extent of their activity in Communist affairs.

B. THE ATTORNEY GENERAL'S ORDER THAT THE RESPONDENT BE DETAINED IN CUSTODY WAS WELL WITHIN THE DISCRETIONARY AUTHORITY GIVEN HIM BY CONGRESS

The District Court found as a fact that the respondent was an active communist and an official in a local communist organization (R. 11, 12). The court also found as a conclusion of law that the Attorney General had not exceeded the discretion granted him (R. 13). The court below did not reach a different conclusion on the facts and its finding of abuse of discretion was squarely based on the concept that the future availability of the respondent was the crucial factor in granting or refusing bail (R. 92).

Therefore, if our position in the preceding portion of this brief is correct, namely that Congress intended the Attorney General to give great weight to the dangers to the country from the continued activities of communist aliens at large during deportation proceedings, there is no reason to believe that the court below, had it accepted that premise, would have reached a different conclusion than the Attorney General and the district court.

Even before Congress strengthened the authority of the Attorney General by amending Section 20 of the Act, the courts had made it clear that the primary responsibility for reaching a determination on bail rested with the Attorney General and "that the court's opinion as to whether an alien should be admitted to bail can only override that of the Attorney General where the alien makes a clear and convincing showing that the decision against him was without a reasonable foundation. In the absence of such proof, the administrative decision [was] final." *United States ex rel. Potash* v. *District Director of Immigration*, 169 F. 2d 747, 751–752 (C. A. 2). By amending the Act Congress must have intended to spell out the authority so clearly that no court could misunderstand.

There is no dispute as to the underlying facts in this case. Admittedly the respondent had been a member of the Communist Party and an officer of his local unit. He had participated actively in

the affairs of the party for many years. The evidence convinced the District Court that his membership continued to the very time of the hearing before it, and the respondent admitted membership as late as 1949. In view of the Congressional findings as to the danger to the national welfare arising from such activities, no court could fail to find that there was a logical basis for the Attorney General's exercise of discretion.

But even on the issue as posed by the court below, the fact that the respondent has heretofore put in an appearance at hearings is no basis for assuming he will continue to do so. At the time of prior stages in the proceeding when he had not failed to appear, the deportation statute had not been amended to make membership in the Communist Party *per se* a ground for deportation.[8] Moreover, prior to the enactment of the Internal Security Act, it was well known that aliens from "iron-curtain" countries[9] could not be deported despite orders of deportation against them. Thus, the eventuality of the respondent's actually being deported was vastly increased by the passage of the new law. Nor can respondent's own statements of his intentions be accepted at face value; the decision as to whether or not to appear may well be dictated to him by others since, as Con-

[8] The Internal Security Act became law on September 23, 1950. The prior deportation hearings at which respondent had appeared were held in October 1949, and on September 19, 1950.

[9] The respondent entered the country from Poland (R. 23).

gress found in Section 2 (15) of the Internal Security Act, membership in the Communist Party is "rigidly and ruthlessly disciplined."

II

THERE IS NO CONSTITUTIONAL IMPEDIMENT TO THE DETENTION OF THE RESPONDENT PENDING A DETERMINATION OF HIS LIABILITY TO DEPORTATION

This Court has frequently been called on to determine the extent to which the Constitution limits the application and implementation of Congress' acknowledged power to exclude and expel aliens. The majority and dissenting opinions in *Fong Yue Ting* v. *United States*, 149 U. S. 698, which was concerned with the validity of a registration requirement to make effective the Congressional policy of excluding Chinese under the Exclusion Act of 1892, might well serve as brief and reply brief in the present case. As here, the essence of the problem was the reconciliation of an attempt by Congress to provide an effective method of protecting the national interest with the protection of the personal rights of the particular aliens involved.[10]

From the many cases upholding the power of the nation to protect itself, while at the same time reasserting the determination to give even the

[10] An earlier example of the same problem which did not reach the courts arose in connection with the Alien Act of June 25, 1798 (1 Stat. 570) which was vigorously attacked by Jefferson and Madison (See, e. g., 4 Elliot's *Debates*, p. 554).

nation's worst enemies their full measure of due process, there have emerged certain concepts which can be accepted as established:

1. Congress has the absolute right to determine what aliens may enter this country, and, once here, what aliens shall be subject to deportation. No alien gains a vested right to remain in this country because of his admission or residence here. *Fong Yue Ting* v. *United States*, 149 U. S. 698, at 710–1; *Chae Chan Ping* v. *United States*; 130 U. S. 581.

2. Deportation proceedings against aliens are not criminal in character (*Bugajewitz* v. *Adams*, 228 U. S. 585, 591; *Zakonaite* v. *Wolf*, 226 U. S. 272, 275), but the effect of a deportation order on the personal life of an alien is so serious, even though it is not inflicted as a punishment, that the human rights involved deserve the fullest protection. See *Jordan* v. *De George*, 341 U. S. 223, 231; *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10.

3. Aliens within our borders are entitled to due process of law in the conduct of deportation proceedings against them. (*The Japanese Immigrant Case*, 189 U. S. 86).

4. Due process of law in deportation proceedings does not require that the status of aliens be adjudicated by the courts; Congress has the constitutional power to vest the final determination on deportability in the executive branch of the Government. *Nishimura Ekiu* v. *United States*,

142 U. S. 651; *Zakonaite* v. *Wolf*, 226 U. S. 272.

5. The executive branch of the Government in carrying out its functions in deportation-proceedings must afford aliens a fair hearing with an opportunity to meet the charges against them. *The Japanese Immigrant Case*, 189 U. S. 86; *Vajtauer* v. *Commr. of Immigration*, 273 U. S. 103.

It is in the light of these concepts that it must be determined whether or not the detention of the respondent, pending the determination of his deportability, was an infringement of any of his constitutional rights and specifically of his rights under the Eighth and Fifth Amendments.

A. THE EIGHTH AMENDMENT DOES NOT REQUIRE THAT THE RESPONDENT BE RELEASED ON BAIL

It has been uniformly held that the bail provisions of the Eighth Amendment and of the implementing legislation [11] apply only to criminal

[11] Even before the adoption of the Constitution the Confederate Congress provided in Article II of the Ordinance of 1787 for the Northwest Territory as follows:

"All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great" (U. S. C. 1946 Ed., p. XXXIV).

Then in 1789, Congress provided in Sec. 33 of the Judiciary Act:

"* * * And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law." (1 Stat. 91.)

cass. *Ex parte Watkins*, 7 Pet. 568, 573; *In re Lum Poy*, 128 Fed. 974, 975 (C. C. D. Mont.); *In re Ah Tai*, 125 Fed. 795, 796–7 (D. Mass); *Ex parte Perkov*, 45 F. Supp. 864 (S. D. Cal.); *United States ex rel. Carapa* v. *Curran*, 297 Fed. 946, 951 (C. A. 2).

There is a reasonable basis for this distinction between criminal and noncriminal proceedings since the basis for allowing bail in criminal proceedings is to avoid the punishment of a defendant before he has been adjudged guilty and even thereafter, pending review by the appellate courts, where any substantial question persists. See *Stack* v. *Boyle*, No. 400, decided November 5, 1951; *Hudson* v. *Parker*, 156 U. S. 277, 285; *United States* v. *Motlow*, 10 F. 2d 657, 662 (Opinion by Mr. Justice Butler sitting as Circuit Justice in the Seventh Circuit); *Williamson* v. *United States*, 184 F. 2d 280, 284 (Opinion by Mr. Justice Jackson sitting as Circuit Justice in the Second Circuit). In noncriminal cases punishment is not the ultimate objective, and detention before final conviction cannot therefore be considered an anticipation of a punishment which has not been finally imposed.

At the present time the provision as to bail is found in Section 46 (a) of the Rules of Criminal Procedure, which provides:

"1. *Before Conviction.*—A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense."

Deportation proceedings have consistently been held not to be criminal in character. The fundamental nature of such proceedings has been well stated by this Court in *Fong Yue Ting* v. *United States,* 149 U. S. 698, at pp. 709 and 730:

> "Deportation" is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken.
>
> * * * * *
>
> The proceeding [under Chinese Exclusion Act of 1892] before a United States judge, as provided for in section 6 of the Act of 1892, is in no proper sense a trial and sentence for a crime or offence. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment.

And in *Wong Wing* v. *United States,* 163 U. S. 228, this Court refused to permit imprisonment at hard labor in connection with deportation proceedings, but upheld the right to detain and deport as not involving a punishment. and

characterized the proceedings as not being criminal in character. See also *United States ex rel. Potash* v. *District Director of Immigration and Naturalization*, 169 F. 2d 747 (C. A. 2); *Prentis* v. *Manoogian*, 16 F. 2d 422 (C. A. 6); *Chin Wah* v. *Colwell*, 187 Fed. 592 (C. A. 9); *Principe* v. *Ault*, 62 F. Supp. 279 (N. D. Ohio); *United States ex rel. Fook Tong* v. *Watkins*, 58 F. Supp. 906 (S. D. N. Y.); *United tSates ex rel. De Cicco* v. *Longo*, 46 F. Supp. 169 D. Conn.); *Ex parte Perkov*, 45 F. Supp. 864 (S. D. Cal.); *United States ex rel. Ioannis* v. *Garfinkel*, 44 F. Supp. 518 (W. D. Pa.); *In re Ah Tai*, 125 Fed. 795 (D. Mass.).

However, even it it were held that the Eighth Amendment did apply to deportation proceedings in the same manner that it applies to criminal proceedings, or that, though not specifically applicable, the same limitations apply by reason of the due process clause of the Fifth Amendment, still the statutory provision authorizing the Attorney General to hold aliens without bond in these cases would not be unconstitutional.

The specific language of the Eighth Amendment relating to bail is:

> Excessive bail shall not be required, * * *.

This provision is patterned after the comparable provision in the English Bill of Rights of 1688, "That excessive baile ought not to be required" (1 Wm. & M., ch. 2, 1688). It is obvious that neither of these provisions is operative by itself but must be read in conjunction with statutory

requirements defining the situations in which offenses are bailable. The statutes in England have varied from time to time in this respect. At the time of the adoption of the English Bill of Rights the Statute of Westminister (First), 3 Ed. 1, ch. 15 (1275), listed a considerable number of offenses in which not only was bail not required to be granted but in which the granting of bail was actually prohibited.[12] The Indictable Offenses Act, 1848 (11 and 12 Vict., c. 42, S. 23),

[12] Petersdorff *On Bail* (1824) quotes this statute at pages 477–478 as follows:

"It was accordingly provided, that prisoners outlawed, abjurors of the realm, provers, those taken with the manour, breakers of the king's prison, thieves openly defamed, those appealed by provors (so long as the provors are living,) those taken for house-burning, for false money, or for counterfeiting the king's seal, persons excommunicate, taken at the request of the bishop; or for offences manifest, or traitors to the king, shall not be bailable; but such as be indicted of larceny by inquests before sheriffs or bailiffs, or of light suspicion, or for petty larceny under twelve pence (if not guilty of larceny aforetime,) or guilty of receipt of felons, or of commandment or force, or of aid of felony done; or guilty of any other trespass, for which one ought not to lose life or member; and persons appealed by provor, after the death of the provor, shall be bailable by sufficient surety, whereof the sheriff shall be answerable: and if the sheriff, or any other, let persons not bailable go by surety, and be thereof attainted, he shall lose his fee and office forever; and if any under-sheriff, constable, or any other bailiff of fee, do so contrary to the will of his lord, they shall be imprisoned three years and make fine at the king's pleasure; and if any withhold prisoners bailable, after they have offered sufficient surety, he shall pay grievous amerciament to the king, and if he take reward for it, he shall pay the prisoner double, and make fine to the king."

which is still the law, requires bail only in the case of misdemeanors and gives discretion to grant or withhold bail for most indictable offenses.[13]

In this country Congress has exercised the same power to withhold bail as a matter of right by providing that in the case of crimes punishable by death the grant of bail shall be discretionary. See fn. 11, supra, p. 30.

[13] This statute provides (5 Halsbury's Statutes of England (2d ed., 1948), p. 679):

"Where any person shall appear or be brought before a justice of the peace charged with any felony, or with any assault with intent to commit any felony, or with any attempt to commit any felony, or with obtaining or attempting to obtain property by false pretences, or with a misdemeanor in receiving property stolen or obtained by false pretences, or with perjury or subornation of perjury, or with concealing the birth of a child by secret burying or otherwise, or with wilful or indecent exposure of the person, or with riot, or with assault in pursuance of a conspiracy to raise wages, or assault upon a peace officer in the execution of his duty, or upon any person acting in his aid, or with neglect or breach of duty as a peace officer, or with any misdemeanor for the prosecution of which the costs may be allowed out of the county rate, such justice of the peace *may, in his discretion, admit* such person to bail * * *; and where any person shall be charged before any justice of the peace with any indictable misdemeanor other than those hereinbefore mentioned, such justice, after taking the examinations in writing as aforesaid, instead of committing him to prison for such offence, *shall admit* him to bail in manner aforesaid * * *: Provided nevertheless, that no justice or justices of the peace shall admit any person to bail for treason, nor shall such person be admitted to bail, except by order of one of her Majesty's Secretaries of State, or by her Majesty's Court of Queen's Bench at Westminster, or a judge thereof in vacation." [Emphasis supplied.]

Since the policy as to what offenses shall be bailable is one for the legislature both in this country and in England, there does not appear to be any constitutional reason why Congress should not have extended the area of cases where bail is not a matter of right to other situations where it is believed the public interest required that bail be considered a matter of discretion. This right of Congress has been recognized by the courts. See *United States ex rel. Carapa* v. *Curran*, 297 Fed. 946, 952 (C. A. 2): "The power to admit to bail is not a mere matter of practice. In the United States the right to bail is thought to be dependent on statutes." (See also *United States* v. *Delaney*, 8 F. Supp. 224 (D. N. J.); *In re Hanoff*, 39 F. Supp 169 (N. D. Cal.); *Ex parte Perkov*, 45 F. Supp. 864, 867 (S. D. Cal.))

Therefore, even if the Eighth Amendment were considered to apply to deportation proceedings in the same manner that it applies to criminal proceedings, such application would not impose a bar to action by Congress placing the discretion to grant or refuse bail in the hands of the Attorney General; it would only prevent the imposition of excessive bail in a situation where release on bail is mandatory.

B. THE FIFTH AMENDMENT DOES NOT PREVENT THE CONTINUED DETENTION OF RESPONDENT PENDING DETERMINATION AS TO HIS DEPORTABILITY

The argument on the Fifth Amendment, as we understand it, is that, wholly apart from any right

to bail as such, the detention of the respondent prior to a determination that he is deportable is a deprivation of his liberty without due process of law. There is no question but that the due-process clause of the Fifth Amendment is applicable to deportation proceedings, and the question is whether due process requires an alien communist to be left free on bond between the date of his original arrest and the date he is ordered deported or is in fact deported."

The right to detain an alien in connection with a deportation proceeding was specifically considered by this Court in connection with the Chinese Exclusion Act of 1892 (27 Stat. 25). In *Wong Wing* v. *United States*, 163 U. S. 228, this Court stated at page 235:

> We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while

---

" We do not understand that in this case the problem is one of the fairness of the proceeding, since the respondent has been given a full hearing before an immigration examiner, in which hearing, under the applicable regulations, he had notice of the proceeding and of the charges against him; the right to counsel, the right to introduce evidence, and the right to cross-examine witnesses produced against him (See 8 C. F. R. (1949 ed.), Section 150.4–150.6).

> arrangements were being made for their deportation. Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense.

This statement was made with respect to a statute which gave the alien no specific right to bail in any case whatsoever. The law was therefore much harsher than the provision of the Immigration Act now before this Court where bail may be granted in appropriate cases.

The Immigration Acts did not include a provision specifically permitting bail until the Act of 1907 (34 Stat. 898), although the Act of 1903 (32 Stat. 1213) contained a provision which required immigration officials to take certain aliens into custody for deportation. No one questioned the right of Congress thus to permit aliens to be arrested and detained without bail pending determination of their deportability. Without considering it necessary to comment on the validity of denying bail to aliens in deportation proceedings, the court, in *United States ex rel. Zapp* v. *District Director of Immigration and Naturalization*, 120 F. 2d 762 (C. A. 2), simply stated, at p. 765, that "before 1907, no right to bail existed in these proceedings."

In 1907 the Immigration Act included the following provision for bail, which was continued in the 1917 Act and only recently amended by the Internal Security Act of 1950, Section 23:

> Sec. 20. * * * pending the final disposal of the case of any alien so taken into custody, he may be released under a bond in the penalty of not less than five hundred dollars with security approved by the Secretary of Commerce and Labor * * *[15]

The leading case interpreting this provision is *United States ex rel. Potash* v. *District Director of Immigration*, 169 F. 2d 747 (C. A. 2). In this case, the Court determined that the Attorney General was given discretion to grant or refuse bail, but that his exercise of that discretion was subject to review by the courts. It is interesting to note that the Court seemed to accept without question the proposition that the grant of such discretion to hold the alien prior to final determination raised no serious constitutional issue. The Court stated at page 752:

> If the Eighth Amendment of the Constitution is considered to have any bearing upon the right to bail in deportation proceedings, and this has been denied, it is our opinion that the provisions of that Amendment and any requirement of the due process provisions of the Fifth Amendment will be fully satisfied if the standards of fairness and reasonableness we have set forth regarding the exercise of discretion by the Attorney General are observed.

---

[15] As is pointed out at p. 14, *supra*, the legislative history of this provision does not indicate that it was included because of any belief that the Constitution required it.

And even in *Prentis* v. *Manoogian*, 16 F. 2d 422 (C. A. 6), which interpreted the 1917 Act as making the right to demand bail mandatory, that conclusion was reached as a result of statutory construction rather than on any ground that the Constitution gave the alien such a right.

Coming now to the cases involving the bail provisions of Section 23 of the Internal Security Act of 1950, even the court below did not reach its conclusion on the constitutional ground. The court held that the Attorney General abused his discretion, not that Congress had no constitutional power without infringing due process to give him the discretion to withhold bail. Similarly, in *United States ex rel. Heikkinen* v. *Gordon*, 190 F. 2d 16 (C. A. 8), a petition for a writ of certiorari with respect to which is now pending, the Eighth Circuit's position was consistent with that of the Sixth in the current case in that no substantial constitutional question was considered as involved. And, finally, in *Carlson* v. *Landon*, 187 F. 2d 991 (C. A. 9), now pending before this Court on certiorari, the court of appeals, in upholding the discretion of the Attorney General, did not find that there was a sufficiently substantial constitutional question to require discussion.

It is submitted that the position uniformly taken by the courts on bail in deportation proceedings is sound. Once it is established that there is no deprivation of liberty without due process of law involved in a deportation order

itself, it seems to follow that the collateral but lesser function of detaining an alien in custody in order to make effective a proceeding to determine his deportability follows as a matter of course. Compare *Fong Yue Ting* v. *United States*, 149 U. S. 698.[16]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
JOHN F. DAVIS,
Special Assistant to the Attorney General.
BEATRICE ROSENBERG,
SAMUEL DASH,
Attorneys.

NOVEMBER 1951.

[16] There is not in issue in this case any abuse of discretion by the Attorney General in detaining the alien for an unreasonable or unnecessary time. Such an abuse might well constitute abuse of due process and justify a court in granting habeas corpus. Compare *United States ex rel. Janavaris* v. *Nicolls*, 47 F. Supp. 201 (D. Mass.). As a matter of fact, any delay in the current proceedings has been occasioned in order to meet the convenience of the respondent (R. 77).

U. S. GOVERNMENT PRINTING OFFICE: 1951